

HON. RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHANCE SIMMS and NOVELLA
COLEMAN,

Plaintiffs,

vs.

LAKESIDE SCHOOL,

Defendant.

) Cause No. 06-1412 RSM

) PLAINTIFF SIMS'S MOTION FOR
) PROTECTIVE ORDER

) NOTED FOR:
) February 27, 2007

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to F.R.C.P. 26(c) and CR (d)(2)(D), plaintiff Chance Sims respectfully requests that the Court enter a Protective Order to prohibit defendant from obtaining his private and confidential medical records as defendant had indicated it intends to do with a Notice of Intent to Subpoena Dr. John Vassall's records.

Chance Sims asserts claims of race discrimination, harassment, and retaliation against his employer, defendant Lakeside School. Plaintiff Sims testified during his two day deposition that he has not seen any health care providers for any symptoms or injuries that he claims is a result from his claims. As he testified, Mr. Sims is not making any claim that any medical treatment or specific medical diagnosis was related

1 to his discrimination/harassment and retaliation claims. He does not intend to call any
 2 health care provider as a witness at trial. In response to specific questions by defense
 3 counsel, plaintiff testified regarding his emotional distress, including sadness, loss of
 4 appetite, loss of sleep, and ceasing to eat lunch in the cafeteria as examples of how the
 5 racially hostile work environment affected him. Despite this testimony and despite
 6 plaintiff's repeated assertion of the physician-patient privilege and privileges
 7 associated with other health care providers, defendant served a notice of intent to
 8 subpoena Chance Sims's medical records from Dr. Vassall. (*Exhibits 1, 2; DeCosta*
 9 *Declaration*)
 10

11 II. STATEMENT OF ISSUES

12
 13 Should the Court enter a Protective Order prohibiting defendant from
 14 obtaining Mr. Sims's private, confidential, and privileged medical records when

- 15 1. Plaintiff has not waived his physician-patient privilege;
- 16 2. Plaintiff is not planning on calling health care providers to testify
 17 at trial and has not disclosed any such witnesses;
- 18 3. Plaintiff has not and is not planning on admitting
 19 communications between any provider and the plaintiff at trial;
- 20 4. Plaintiff is not asserting a medical or psychological diagnosis as
 21 being causally related to the harassment/discrimination and/or retaliation;
- 22 5. Plaintiff's emotional distress did not result in a medical or
 23 psychological "diagnosis" and his emotional distress is easily understood and that an
 24 ordinary person would likely experience in similar circumstances and constitutes

1 matters within the everyday experience of the average juror as being attributable to
2 racial discrimination/harassment and retaliation and thus meets the generic definition
3 of "garden variety" emotional distress;
4

5 6. Plaintiff is not asserting an outrage or negligent or intentional
6 infliction of emotional distress claim; and

7 7. Plaintiff is not asserting a "bodily" injury claim.

8 **III. EVIDENCE RELIED UPON**

9 1. Declaration of Virginia L. DeCosta with attached Exhibits; and

10 2. The files and records herein.
11

12 **IV. MEET AND CONFER REQUIREMENT**

13 On Friday, February 9, 2007, counsel for the parties conducted the required
14 LR 37 conference prior to the filing of this Motion. The parties cannot reach a
15 compromise necessitating this Motion.
16

17 **V. THE COURT HAS BROAD DISCRETION TO ISSUE A PROTECTIVE ORDER**
18 **UNDER THE FACTS AND LAW HERE - - THE COURT SHOULD ADOPT A**
19 **CONSERVATIVE VIEW OF WAIVER OF PRIVILEGE BECAUSE PLAINTIFF'S**
20 **CONSTITUTIONAL RIGHT TO PRIVACY WOULD BE VIOLATED IF**
21 **DISCLOSURE WERE REQUIRED**

22 The scope of discovery is a matter within the trial court's broad discretion.
23 Pursuant to F.R.C.P. 26(c), a Court may enter a Protective Order that justice requires to
24 protect a party . . . from annoyance, embarrassment, and oppression for good cause
25 shown. Here, good cause exists not to violate the physician-patient privilege.
26

1 To determine if good cause exists for a protective order, the Court must balance
2 the competing interests of the parties. *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 232,
3 654 P.2d 673 (1982).

4 In this case and pursuant to case law cited herein, there are a number of factors
5 that militate against discovery of Chance Sims's confidential and privileged medical
6 records:
7

8 1. Mr. Sims has not waived his physician-patient privilege;

9 2. Mr. Sims is not planning on calling health care providers to testify
10 at trial and has not disclosed any such witnesses;

11 3. Mr. Sims has not and is not planning on offering evidence of
12 communications between any health care provider and the plaintiff at trial;

13 4. Mr. Sims is not asserting a medical or psychological diagnosis as
14 being causally related to the harassment/discrimination and/or retaliation;

15 5. Mr. Sims's emotional distress did not result in a medical or
16 psychological diagnosis and his emotional distress is easily understood and that an
17 ordinary person would likely experience in similar circumstances and constitutes
18 matters within the everyday experience of the average juror as being attributable to
19 racial discrimination/harassment and retaliation and thus meets the generic definition
20 of "garden variety" emotional distress;
21

22 6. Mr. Sims is not asserting an "outrage" or "negligent or intentional
23 infliction of emotional distress" claim; and
24

25 7. Mr. Sims is not asserting a "bodily" injury claim.
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1 Chance Sims asserts a substantive state claim under RCW 49.60 and federal
 2 claim under 42 U.S.C. § 1981. Mr. Sims has a Constitutional right to privacy. The
 3 United States Supreme Court recognized the right of privacy as a distinct
 4 constitutional right in *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510,
 5 85 S. Ct. 1678 (1965). The United States Supreme Court also interpreted the 14th
 6 Amendment to include "a right of personal privacy." *Roe v. Wade*, 410 U.S. 113, 152,
 7 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973).

8
 9 The Court has further recognized a privacy interest in the confidentiality of
 10 one's medical records. *Fritsch v. City of Chula Vista*, 187 F.R.D. 614,
 11 633 (S.D.CA.1999)(internal citations omitted). And specifically, the Court recognizes a
 12 psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 135 L.Ed. 2d 337,
 13 116 S. Ct. 1923 (1996).

14
 15 In Washington, Mr. Sims is protected by a statutory physician-patient privilege
 16 set forth in RCW 5.60.060(4). Furthermore, under Washington law, the Constitution
 17 guarantees additional protection to the fundamental right of privacy in Article 7,
 18 Section 7:

19
 20 No person shall be *disturbed in his private affairs*, or his home
 21 invaded, without authority of law. [Emphasis added] ¹

22 As such, it is well established that a patient's statements to his physician and
 23 related records are privileged. *Ruhlmann v. Ulster County Dept. of Social Services*,
 24 194 F.R.D. 445, 448 (N.D.N.Y. 2000).

25
 26
 27 ¹ See also, RCW 70.02 *et. seq.* that applies to medical records.
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1 **A. PLAINTIFF SIMS HAS NEITHER EXPLICITLY NOR IMPLIEDLY**
2 **WAIVED HIS PHYSICIAN-PATIENT PRIVILEGE**

3 Chance Sims has not explicitly waived his physician-patient privilege and his
4 privilege with other health care providers. His counsel repeatedly asserted these
5 privileges during discovery thus far and objected to disclosure of communications
6 between plaintiff and his providers, to include Dr. Vassall.

7 Similarly, Chance Sims has not impliedly waived his privilege. As the Court
8 knows under RCW 49.60 *et seq.*, Title VII, and 42 U.S.C. § 1981, a plaintiff can seek
9 damages for emotional pain, suffering, mental anguish, and loss of enjoyment of life.
10 Merely because of seeking these damages, a plaintiff does impliedly waive his
11 privileges with health care providers. Courts recognize that a plaintiff does not
12 impliedly waive his physician-patient privilege by asserting emotional distress
13 damages. Courts look at factors to include the following to determine that Mr. Sims
14 has not impliedly waived his privilege – all of which exist here:
15 has not impliedly waived his privilege – all of which exist here:

- 17 1. He has not waived his physician-patient privilege;
- 18 2. He is not planning on calling health care providers to testify at
19 trial and has not disclosed any such witnesses;
- 20 3. He has not and is not planning on admitting communications
21 between the provider and the plaintiff at trial;
- 22 4. He is not asserting a medical or psychological diagnosis as being
23 causally related to the harassment/discrimination and/or retaliation;
- 24
- 25
- 26

1 5. His emotional distress did not result in a medical or psychological
2 diagnosis and emotional distress that one can easily understand and that an
3 ordinary person would likely experience in similar circumstances and constitutes
4 matters within the everyday experience of the average juror as being attributable to
5 racial discrimination/harassment and retaliation and thus - meets the generic
6 definition of "garden variety" emotional distress;
7

8 6. He is not asserting an outrage, or negligent or intentional
9 infliction of emotional distress claim; and
10

11 7. He is not asserting a "bodily" injury claim.
12

13 In *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 229-30 (D.Mass. 1997), a
14 discrimination and retaliation case, the plaintiff sought damages for emotional
15 distress. The Court determined that merely seeking emotional distress damages was
16 insufficient to place the plaintiff's mental condition at issue. The Court held that
17 privileged communications were waived only when the plaintiff introduces
18 privileged communications in evidence either directly or by calling the particular
19 provider as a witness. Plaintiff Sims has not introduced privileged communication
20 directly and will not be calling medical providers as witnesses.
21

22 Similarly in *Fitzgerald v. Cassie*, 216 F.R.D. 632 (D.C. CA. 2003), a harassment
23 suit under the Fair Housing Act (similar to the anti-discrimination laws in the
24 employment context) the Court quashed subpoenas directed to plaintiff's medical and
25 psychological providers. Holding that the medical records were irrelevant, the Court
26

1 reasoned that the plaintiff (1) was not asserting a bodily injury claim, (2) was not
2 relying on any provider or other expert to prove emotional distress damages, (3) had
3 not pleaded a claim for either intentional or negligent infliction of emotional distress,
4 and (4) had not pleaded any specific disorder or diagnosis as causally related to the
5 harassment. There, the Court concluded that the plaintiff's emotional distress
6 symptoms – headaches, depression, anger, irritability, discouragement, nervousness,
7 withdrawal, and low self esteem were of such nature as to not impliedly waive
8 plaintiff's privileged communications.
9

10 In *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (S.D.CA.1999), an employment
11 discrimination case, the Court held that plaintiff's medical records were protected
12 from discovery and further, quashed defendant's subpoenas to obtain the records.
13 The Court found that plaintiff did not waive her privilege by asserting claims of
14 emotional distress when she had not put the substance of her communications with
15 her providers in issue in the litigation.
16

17 The Court further considered the following facts: (1) that plaintiff had not
18 brought a claim for either intentional or negligent infliction of emotional distress; (2)
19 that plaintiff did not allege that she suffered a psychiatric injury or disorder relating to
20 defendant's conduct; (3) that she did not claim to suffer from unusually severe
21 emotional distress; and (4) that she did not intend to offer expert testimony regarding her
22 emotional distress. "Rather, she merely claims damages for emotional distress which
23 she says she suffered as a result of defendants' actions as alleged in the complaint.
24

25 The mental suffering Plaintiff claims 'does not exceed the suffering and loss an
26
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1 ordinary person would likely experience in similar circumstances' and constitutes
2 'matters that were within the everyday experience of the average juror.'" *Id.* (internal
3 quotations in the original)

4
5 Additionally in *Ruhlmann v. Ulster County Dep't of Soc. Servs.*, 194 F.R.D. 445,
6 449 n.6 (N.D.N.Y. 2000), the Court concluded that the plaintiff did not waive the
7 psychotherapist-patient privilege by seeking garden variety or "incidental emotional
8 distress damages." (quotations in the original)

9
10 Courts may find an implied waiver when the plaintiff has done more than
11 allege "garden variety" emotional distress. Garden-variety emotional distress has
12 been described as "ordinary or commonplace emotional distress" or "that which is
13 'simple or usual'." In contrast, emotional distress that is not garden variety "may be
14 complex, such as that resulting in a specific psychiatric disorder." *Fitzgerald* at 637.
15 (internal quotations in the original)

16
17 In *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 226 (D.N.J. 2000), the Court held that if
18 a plaintiff merely alleged garden-variety emotional distress - and not "a separate tort
19 for the distress, any specific psychiatric injury or disorder, or unusually severe
20 distress" - then she did not waive the psychotherapist-patient privilege. *See also*
21 *Smithson v. Trujillo*, 977 P.2d 152, 157 (Colo. 1999) (holding that making a "generic"
22 claim for emotional distress damages does not constitute a waiver of the privilege
23 where mental suffering alleged does not exceed what an ordinary person would likely
24 experience in similar circumstances); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 527
25
26

(N.D. Ill. 1999)(finding no waiver of privilege where plaintiff merely seeks damages for emotional harm resulting from defendants' misconduct).

B. POLICY REASONS DICTATE THAT A CONSERVATIVE APPROACH TO CONSTRUING WAIVER OF PRIVILEGES SHOULD BE USED HERE

In employment discrimination and retaliation cases, the Washington Legislature and Congress have placed significant importance on litigants' access to courts and remedial measures. As such, courts should approach a defendant's broad claim of "waiver" of physician-patient privilege with utmost caution². These purposes would be undermined if those vindicating civil rights and seeking recovery for general damages were deterred by allowing defendant's to obtain confidential information to which it is not entitled.

To condition recovery for emotional distress incidental to the violation of state and federal constitutional and statutory rights upon the surrender of the protection of privileged confidential privilege is antithetical to the purpose of the laws that provide redress for such violations. *See, Ruhlmann v. Ulster County Dep't of Soc. Servs.*, 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000); *Fitzgerald v. Cassil*, 216 F.R.D. 632 (D.C. CA. 2003).

² RCW 49.60.010 states that "... discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of free democratic state." RCW 49.60.020 requires courts to liberally construe the statute to prevent and eradicate discrimination and retaliation. Under 49.60.030, a Washington citizen enjoys civil rights, which includes "[t]he right to be free from discrimination."

C. THE DEFENSE HAS OTHER METHODS BY WHICH TO QUESTION PLAINTIFF ABOUT HIS DAMAGES THEREBY DEFEATING ANY ALLEGATION THAT IT IS THWARTED IN ITS EFFORTS TO QUESTION OR CHALLENGE PLAINTIFF'S DAMAGE CLAIMS

This issue was squarely addressed in *Fitzgerald v. Cassil*, 216 F.R.D. 632, 638 (D.C. CA. 2003) and *Fritsch v. City of Chula Vista*, 187 F.R.D. 614 (D.C.CA. 1999). In *Fitzgerald*, when the Court held that plaintiff's records were irrelevant and no implied waiver existed, the Court in reiterated ways in which the defendant there, and similarly the defendant here, can obtain information regarding damages such as: (1) the defendant can cross-examine the plaintiff about other stressors or contributing factors that may explain or have contributed to the emotional distress; (2) the defendant can examine percipient witnesses or find other evidence to use in its case; (3) the defendant can elicit (which it already has here) that the plaintiff did not seek treatment or therapy. As noted by the *Fitzgerald* court: "These examples illustrate that the defendant has numerous avenues through which it can make its case without delving into the plaintiff's confidential communications..." *Id.* at 638.

In *Fritsch* the Court dispelled defendants' claim that it would be "unfair" not to require production of records because to do so may deprive them of important evidence that it claimed was relevant to the issue of emotional distress. The Court responded that the defendants' argument "...reflects a fundamental misunderstanding of the nature of the law of privilege. It is the very essence of evidentiary privileges to protect from disclosure relevant evidence." *Fritsch* at 631 (internal citations omitted)

In the present case, Mr. Sims divulged highly sensitive medical information to Dr. Vassall. He did so with the expectation that his communications were going to be confidential and privileged. The substantial harm here is the complete intrusion and obliteration of a constitutional right when defendant has methods by which to defend the claim.

VI. CONCLUSION

This is precisely the situation that F.R.C.P. 26(c) was created to address. This Court has the authority to enter a Protective Order to prevent this substantial harm.

Respectfully submitted this 16th day of February, 2007.

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